IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 6, 2006 Session

# MICHAEL HANNAN, ET AL. v. ALLTEL PUBLISHING CO., ET AL.

**Appeal from the Circuit Court for Monroe County**
**No. V04370H John B. Hagler, Jr., Judge**

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**No. E2006-01353-COA-R3-CV - FILED JANUARY 26, 2007**

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The plaintiffs, Michael Hannan and his wife, Elizabeth Hannan, advertised their businesses through the local telephone directory. In 2003, the plaintiffs purchased from Alltel Publishing Co. ("Alltel") advertising space in the new directory. However, Alltel failed to include the plaintiffs' advertisement in the new directory. This prompted the plaintiffs to file suit against Alltel. Alltel filed a motion for summary judgment claiming the plaintiffs were unable to prove that they had incurred any damages as a result of Alltel's failure to include the ad in the directory. Alltel relied, in part, on tax return information showing an increase in the plaintiffs' gross income during the year the ad was missing from the directory. The trial court determined that the plaintiffs would be unable to prove that they incurred any damages. Consequently, the court granted Alltel's motion. We conclude that Alltel's filings fail to negate an essential element of the plaintiffs' claim. Accordingly, we vacate the trial court's grant of summary judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

J. Lewis Kinnard, Madisonville, Tennessee, for the appellants, Michael Hannan and Elizabeth Hannan.

Linda J. Hamilton Mowles, Knoxville, Tennessee, for the appellee, Alltel Publishing Co.

## OPINION

I.

The plaintiffs operated two businesses in Tellico Plains, *i.e.*, Tellico Plains Realty and Magnolia House Bed and Breakfast. They obtained phone service for their businesses through TDS Telecom Corp. ("TDS"). The plaintiffs advertised their businesses primarily through the local phone directory, which was published and distributed by Alltel. In 2002, the plaintiffs purchased a quarter-page ad in the local directory. The plaintiffs were contacted by Alltel prior to the 2003 directory being published, and the plaintiffs again purchased advertising. However, when the 2003 directory was distributed, it did not contain the ad purchased by the plaintiffs. The plaintiffs also claim the business listings for both businesses were missing from the directory. The plaintiffs contacted Alltel and were informed that a mistake had been made and that a supplement would be published and distributed to correct the error. The complaint contains the following allegations:

> [S]ince their advertisements and listings were not in the November 2003 directory, Plaintiffs have lost business and have been unable to expose their business to the public and many of their associates have assumed they have left the business and departed from the Tellico Plains area. Plaintiffs have suffered a dramatic loss of business and have suffered much economic loss and emotional distress so that they have been forced to leave the real estate and bed and breakfast business.

The plaintiffs sued Alltel[1] and sought damages in the amount of $225,000.

Alltel filed a motion for summary judgment claiming "the Plaintiffs are unable to prove they suffered any damages as a result of Alltel's alleged breach of contract." Alltel claims that because the plaintiffs were unable to prove they suffered any damages, there are no genuine issues of material fact and that Alltel is, therefore, entitled to summary judgment. Along with the motion for summary judgment, Alltel filed a Statement of Material Facts Not in Dispute (the "Statement"). There are eight factual averments contained in the Statement, all of which are based upon income tax returns provided by the plaintiffs during discovery. The plaintiffs agree that the financial information set forth in the Statement is accurate. The eight factual averments are as follows:

> In November 2003, the plaintiffs Michael and Elizabeth Hannan paid Alltel Publishing, Co. . . . to display an ad in the local telephone directory.
>
> This ad was not placed in the initial directory. Although this ad was not placed in the directory, their business name and number was listed under "Real Estate Consultants" in the directory.

[1] The plaintiffs also sued TDS, but they later voluntarily dismissed it without prejudice.

> The ad was subsequently placed in a supplement to the 2003 telephone directory.
>
> The plaintiffs had ads placed in the local directory in 2001, 2002, and 2004.
>
> In 2001, the plaintiffs' gross income from their real estate business was $87,703.
>
> In 2002, gross income was $55,645.
>
> In 2003, gross income was $42,138.
>
> In 2004 (the year they lacked the advertising in the directory), gross income increased to $69,355.

(Paragraph numbering in original omitted; internal citations to discovery material also omitted).

In addition to the foregoing financial information and in further support of its motion for summary judgment, Alltel also relies upon the deposition testimony of the plaintiffs to the effect that, given the nature of the real estate business, the plaintiffs were unable to quantify a specific dollar amount in damages they incurred as a result of their ad not appearing in the phone directory. Specifically, Michael Hannan testified that various events can impact the real estate market, such as a war, a presidential election, and increased competition. Michael Hannan then testified:

> Q. What other things negatively impact your sales? I assume the amount of time you work personally would impact them?
>
> A. Yeah.
>
> Q. You said you may have been off some during that year?
>
> A. I, yeah, I don't know whether I was or wasn't. I don't know. You know, my whole point is that you can't tell what's going to happen from one day to the next in the business. It is something you can't determine.
>
> Q. Do you have any specific explanations other than the general ones you've given me that shows the difference in the gross receipts between the years 2001 and 2002?
>
> A. From eighty-seven to fifty-five [thousand]?

Q. Yes.

A. I don't know the answer; no.

Q. Can you tell me why they dropped further in the year 2003?

A. No.

Q. Can you tell me why they increased dramatically in 2004?

A. No.

Q. Would you agree with me that your gross receipts were up significantly in the year that your business was not listed as compared to the previous year when you were listed?

A. That our gross sales were –

Q. Significantly higher in the year that you weren't listed as compared to the year that your were listed?

A. If you're asking me to compare those two lines, yes.

Q. And you told me you cannot give an explanation for that?

A. Other than the fact that we may have sold a piece of our own property, I don't know. We may have had to start to liquidate by then.

Q. Do you know why or do you have an explanation for why in the year preceding the failure to list you had such a low net profit of only $2,000, $1949?

A. I still can't tell you. I couldn't tell you earlier; I can't tell you now. I don't know how this stuff works. I presume, it's possible that we could have paid a debt or something; I don't know. We could have lowered the amount of money we owed on a piece of land for instance. I don't know the answer.

Elizabeth Hannan's testimony regarding their inability to specify an exact dollar amount in damages was similar to that of her husband. She testified:

> Q. Your husband responded to my questions about quantifying in dollars the amount of loss or documentation which would reflect the amount of loss for these omissions that we're here about. Do you have any way of doing that?
>
> A. I have absolutely no way of doing that. And neither does anyone else.…

In reliance upon the tax return information and deposition testimony, Alltel argued that the plaintiffs were unable to prove they had suffered any damages as a result of the advertisement not appearing in the telephone directory. Following a hearing on Alltel's motion, the trial court entered an order granting the motion and dismissing the plaintiffs' case with prejudice.

II.

The plaintiffs appeal raising the following issue, which we take verbatim from their brief:

> Whether or not the trial court was correct in sustaining the motion for summary judgment by defendant Alltel Publishing Co. on the ground that the plaintiffs are unable to prove they suffered any damages as a result of Alltel's alleged breach of contract.

III.

In ***Blair v. West Town Mall***, 130 S.W.3d 761 (Tenn. 2004), the Supreme Court reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment:

> The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *See Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: 1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and 2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Staples*, 15 S.W.3d at 88.

* * *

> When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.
>
> To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

***Blair***, 130 S.W.3d at 763-64, 767 (quoting ***Staples***, 15 S.W.3d at 88-89) (citations omitted)).

IV.

A defendant's contention that a plaintiff will be unable to prove an essential element of its claim is not sufficient to support a grant of summary judgment under Tenn. R. Civ. P. 56. In ***Madison v. Love***, No. 03A01-9903-CV-00069, 1999 WL 1068706 (Tenn. Ct. App. E.S., filed November 14, 1999), *perm app. granted June 19, 2000*, suit was filed seeking damages for the wrongful death of the plaintiff's 16-year old daughter who collapsed at the defendants' nightclub. ***Id***. at *1. The complaint alleged liability on the basis that the death was attributable to "exposure to a propylene glycol-based theatrical fog used" at the nightclub. ***Id***. The second claim alleged that the defendants failed to assist the decedent within a reasonable period of time after she collapsed on the dance floor. ***Id***. The defendants filed a motion for summary judgment relying upon the affidavit of Dr. William McCormick, a pathologist, who stated under oath that the cause of the decedent's death was unknown. ***Id***. The trial court granted the defendants summary judgment after determining that Dr. McCormick's affidavit established that the plaintiff would be unable to prove causation, obviously an essential element of her wrongful death claim. On appeal, this Court affirmed the judgment of the trial court. ***Id***., at *3-4.

After we released our opinion in ***Madison***, which, as noted, affirmed the trial court's grant of summary judgment, the Supreme Court granted the plaintiff's application for permission to

appeal. Without further briefing or oral argument, the Supreme Court entered an order remanding the case to this Court for reconsideration of our conclusion in light of ***McCarley v. West Quality Food Serv.***, 960 S.W.2d 585 (Tenn. 1998). We did just that and released a second opinion, stating, in part, as follows:

> In our original opinion, we concluded that the affidavit of pathologist Dr. William F. McCormick, in which he stated that the cause of death of the plaintiff's decedent … is unknown, was sufficient to negate an essential element of the plaintiff's cause of action, *i.e.*, causation.…
>
> * * *
>
> We have decided that we erred in finding that Dr. McCormick's affidavit negated the element of causation.
>
> While Dr. McCormick's affidavit - and hence his presumed testimony - may be a serious impediment to the successful pursuit of this claim at trial, that is not the issue before us. Material supporting a motion for summary judgment must do more than "nip at the heels" of an essential element of a cause of action; it must *negate* that element. While it is clear that Dr. McCormick's affidavit casts doubt upon the plaintiff's ability to prove causation, that affidavit does not do enough. It does not negate the plaintiff's claim of causation in a way that would trigger the plaintiff's burden to produce countervailing material. In order to negate the element of causation, the defendants would have had to present admissible competent testimony that the defendants' failure to render aid did not cause or contribute to the death of the plaintiff's decedent. The affidavit, with its cause-of-death-is-unknown language is not the same.
>
> The Supreme Court held in *McCarley* that the lower courts in that case failed to properly analyze whether the non-movant's burden was triggered. 960 S.W.2d at 588. We conclude that we are subject to the same criticism. An affidavit which simply casts doubt on a plaintiff's claim is not sufficient to require the plaintiff to engage in a battle of facts "on the papers." In the instant case, the plaintiff was not required to respond to the defendants' motion since the defendants' supporting material did not conclusively negate an essential element of the plaintiff's cause of action. Therefore, we conclude summary judgment was and is inappropriate.

***Madison v. Love***, No. E2000-01692-COA-RM-CV, 2000 WL 1036362, at *1-2 (Tenn. Ct. App. E.S., filed July 28, 2000), *no appl. perm. appeal filed* (emphasis in original).

In ***Blair v. West Town Mall***, 130 S.W.3d 761 (Tenn. 2004), the plaintiff filed suit after she slipped and fell on slick oil spots as she exited the mall. ***Id***. at 762. The defendant filed a motion for summary judgment relying on the plaintiff's testimony that she did not notice the slippery substance and she did not know how long the substance had been there, where it came from, or whether anyone at the mall knew it was there. ***Id***. at 763. The trial court granted the defendant's motion for summary judgment on the basis that the plaintiff could not prove the defendant had actual or constructive notice of the slippery substance. This Court reversed after concluding that the defendant had failed to negate an essential element of the plaintiff's claim. ***Id***. The Supreme Court agreed that summary judgment was not appropriate. The High Court stated as follows:

> In support of Defendant's motion for summary judgment, Defendant offered Plaintiff's deposition testimony that Plaintiff does not know how long the substance had been present on the parking lot or whether Defendant had notice of its presence. The Court of Appeals was correct in noting that while this evidence casts doubt on Plaintiff's ability to prove at trial whether Defendant had actual or constructive notice of the dangerous condition in Defendant's parking lot, it does not negate the element of notice. The deposition testimony does not prove that Defendant did not have actual or constructive notice. Therefore, the materials filed by Defendant did not affirmatively negate an essential element of Plaintiff's claim, and Plaintiff's burden to produce evidence establishing the existence of a genuine issue for trial was not triggered. Therefore, the trial court erred in granting summary judgment.

***Blair***, 130 S.W.3d at 768.

As can be seen, the Supreme Court continues to adhere to the principle that a defendant seeking summary judgment must actually negate an essential element of the plaintiff's claim or establish an affirmative defense before the plaintiff's burden to produce evidence establishing the existence of a genuine issue of material fact is triggered. An assertion that a plaintiff cannot prove an essential element of her claim does not constitute the negating of that element. Hence, it is insufficient to support a grant of summary judgment. *See, e.g.*, ***Lawson v. Edgewater Hotels, Inc.***, 167 S.W.3d 816, 823-24 (Tenn. Ct. App. 2004); ***Hankins v. Chevco, Inc.***, 90 S.W.3d 254, 261 (Tenn. Ct. App. 2002).

Returning to the present case, we conclude that Alltel has failed to negate an essential element of the plaintiff's claim, *i.e.*, that the plaintiffs were damaged as a proximate result of Alltel's failure to publish their advertisement. The plaintiffs alleged that they had been damaged as a result of Alltel's failure. The negative of this allegation is that they had not been damaged. Neither plaintiff testified that they had not been damaged. It is true that the plaintiffs both were unable to *personally* testify as to the extent of their damages; but this is not the same as saying they had not been damaged. Unless and until Alltel is able to satisfy its burden on summary judgment – to show

the plaintiffs had not been damaged – the plaintiffs have the right to attempt to prove their case at trial.

We recently contrasted a situation where the *existence* of damages is speculative with one where the *amount* of the damages is uncertain:

> Speculative damages may not be recovered where the fact of damage is uncertain, contingent or speculative. *See Pinson & Associates Insurance Agency, Inc. v. Kreal*, 800 S.W.2d 486, 488 (Tenn. Ct. App. 1990) (citing *Maple Manor Hotel, Inc. v. Metropolitan Govt. of Nashville and Davidson County*, 543 S.W.2d 593 (Tenn. Ct. App. 1976)). However, while uncertain and speculative damages are prohibited when the *existence* of damage is uncertain, they are not necessarily prohibited when the *amount* is uncertain. *Cummins v. Brodie*, 667 S.W.2d 759, 765 (Tenn. Ct. App. 1984) (emphasis added). When the existence of damage is certain "mathematical certainty is not required." *Id*. (quoting *Coverdell v. Mid-South Farm Equipment Assoc., Inc.*, 335 F.2d 9, 14 (6th Cir.1964)[)].
>
> The courts will allow recovery even if it is impossible to prove the exact amount of damages from the breach of contract. Otherwise, in certain instances, the courts would be powerless to help some wronged parties. "Exact justice is not always attained, and the law does not require exactness of computation in suits that involve questions of damages growing out of contract [or] tort." *Provident Life and Accident Ins. Co. v. Globe Indemnity Co.*, 156 Tenn. 571, 576, 3 S.W.2d 1057 (1928). . . .

***Dunn v. Matrix Exhibits, Inc.***, No. M2003-02725-COA-R3-CV, 2005 WL 2604048, at *5 (Tenn. Ct. App. M.S., filed October 13, 2005), *no appl. perm. appeal filed*. (Emphasis in original). Neither plaintiff said they suffered no damages; they simply expressed an inability at the time of their depositions to say how much damage they had suffered.

Alltel's motion for summary judgment does not prove that the plaintiffs did not incur any damages. Rather, the motion is simply Alltel's claim that the plaintiffs will be unable to prove at trial that they incurred damages. However, the issue before this Court "is not the sufficiency of evidence *at trial*." ***Edgewater Hotels***, 167 S.W.3d at 824 (emphasis in original). We are dealing with summary judgment, not a trial. ***Id***. On summary judgment, Alltel has the burden of negating an essential element of the plaintiffs' claim. Until Alltel meets that burden, which it has not done, the plaintiffs are not required to file anything; the motion fails as a result of its own deficiency.

V.

We recognize that Alltel's filings – premised as they are on an assertion that the plaintiffs cannot prove they suffered damages as a result of Alltel's negligence – are arguably sufficient to support an award of summary judgment under the Federal Rules of Civil Procedure. *See* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 323-27 (1986). The United States Sixth Circuit Court of Appeals has read ***Celotex*** to mean that "the movant [can] challenge the opposing party to 'put up or shut up' on a critical issue." ***Street v. J. C. Bradford & Co***., 886 F.2d 1472, 1478 (6th Cir. 1989). We also recognize that the Tennessee Supreme Court in ***Byrd v. Hall***, 847 S.W.2d 208 (Tenn. 1993) seems to have aligned itself with federal practice:

> Comparison of the state and federal caselaw construing Rule 56 to date reveals no striking differences. The respective interpretations given the Rule are consistent in most material respects.

***Id***. at 214. However, there is a difference between "consistent in most material respects" and totally consistent. Our reading of Tennessee Supreme Court cases[2] post-***Byrd*** convinces us that there is a significant difference between federal practice and Tennessee practice as it pertains to the Tennessee requirement of "negating" an essential element of a plaintiff's claim. We do not believe one can negate an essential element simply by demonstrating that the plaintiff, as of the time of filing of the motion for summary judgment, has no evidence of the element or cannot prove that element. By the same token, we do not believe, under Tennessee summary judgment practice, a movant can force a nonmovant to produce evidence of facts establishing an element of the plaintiff's claim unless or until the movant puts forth evidence truly negating that element. Apparently, under federal summary judgment practice, a movant, without negating an essential element of the plaintiff's claim, can demonstrate that the plaintiff has no evidence of a particular element or insufficient evidence of that element and thereby force the plaintiff to demonstrate that it does have evidence of the particular element if the plaintiff wants to avoid the entry of summary judgment against it. Simply stated, this is a critical difference between Tennessee practice and federal practice.

We acknowledge that our conclusion in this matter conflicts with the majority opinion in ***Denton v. Hahn***, M2003-00342-COA-R3-CV, 2004 WL 2083711, at *10-11 (Tenn. Ct. App. M.S., filed September 16, 2004), *no appl. perm. appeal filed*. However, we note that Judge Cottrell concurred separately in ***Denton*** and took issue with one aspect of the holding of the majority in that case:

> The majority and I differ in our interpretation and application of the *McCarley* through *Blair* line of decisions. Our differing interpretations lead to different conclusions on the notice issue in the

[2] *See, e.g.*, ***Blair v. West Town Mall***, 130 S.W.3d 761, 767-68 (Tenn. 2004); ***Staples v. CBL & Assoc., Inc.***, 15 S.W.3d 83, 88-89 (Tenn. 2000); ***Blanchard v. Kellum***, 975 S.W.2d 522, 525 (Tenn. 1998); ***McCarley v. West Quality Food Serv.***, 960 S.W.2d 585, 588 (Tenn. 1998).

> case before us. The majority concludes that a defendant is entitled to summary judgment if it demonstrates that the plaintiff's, or nonmoving party's, evidence itself is insufficient to establish an essential element of its claim, relying on statements in *Celotex* and *Byrd*. Those statements, however, must be interpreted in light of other statements in *Byrd* as well as the Tennessee Supreme Court's later refinements of them.

2004 WL 2083711, at *15 (footnote omitted). We agree with Judge Cottrell. Because of the conflict between our decision in this case and the ***Denton*** majority, we encourage the Tennessee Supreme Court to address (1) the issue of exactly what is meant by "negating" an element of a plaintiff's claim, and (2) whether Tennessee follows the Sixth Circuit's "put up or shut up" interpretation of ***Celotex***. *See generally*, J. Cornett, *The Legacy of Byrd v. Hall: Gossiping About Summary Judgment in Tennessee*, 69 Tenn. L. Rev. 175 (2001).

VI.

The judgment of the trial court is vacated, and this cause is remanded to the trial court for further proceedings consistent with this opinion. Costs on appeal are taxed to the appellee, Alltel Publishing Co.

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CHARLES D. SUSANO, JR., JUDGE